IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-48

THE SANKO STEAMSHIP CO., LTD.,

Petitioner,

against

NEWFOUNDLAND REFINING COMPANY LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED, PROVINCIAL HOLDING COMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled action.

Opinions Below

The opinion for the United States Court of Appeals for the Second Circuit is unreported. The opinion of the United States District Court for the Southern District of New York is also unreported. Copies of both opinions are annexed hereto as Appendices A and B respectively.

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 by reason of the fact that the Court of Appeals for the Second Circuit has erroneously construed the decision of this Court in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 32 L.Ed. 2d 513, 92 S.Ct. 1907 (1971) (hereinafter sometimes referred to as *Bremen*).

The date of the Judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed and the date of entry is April 15, 1976.

Question Presented for Review

Did the Court of Appeals for the Second Circuit correctly interpret the decision of this Court in *The Bremen* v. *Zapata Off-Shore Co.*, supra, in holding that under said decision the District Court lacked jurisdiction to allow an aggrieved party to a maritime contract to invoke Supplemental Rule B (1) of the Supplemental Rules for Certain Admiralty and Maritime Claims[1] and retain security when such agreement included a foreign forum clause enforceable under *The Bremen* v. *Zapata Off Shore Co.*, supra.

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[1] Supplemental Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure states in part:

"Rule B Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, and Process.

With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. • • • In addition, or in the alternative, the plain-

(*footnote continued on following page*)

Statement

This is an action for breach of three time charter parties entered into between petitioner and respondent Newfoundland Refining Company Limited (N.R.C.) on or about August 8, 1972. The United States District Court had jurisdiction under 28 United States Code, Section 1333(1).

On the 17th day of February, 1976 petitioner instituted an action in the United States District Court for the Southern District of New York in Admiralty pursuant to Rule 9(h) of the Federal Rules of Civil Procedure against respondents for failure to pay charter hire in the sum of $8,112,323.68 due it under the aforesaid charter parties. On the same day petitioner obtained from the said District Court (Whitman Knapp, D.J.) pursuant to Rule B(1) of the Supplemental Admiralty Rules,[2] and Section 6201 of the Civil Practice Law and Rules of the State of New York (C.P.R.L.)[3] a temporary restraining order against respondents and The Sumitomo Bank, Ltd., European American Bank & Trust Co. and Manufacturers Hanover Trust Company preventing respondents from removing, releasing or secreting the cumulative amount of $3,000,000 from accounts which respondents had at said banks, together with an order to show cause as to why petitioner was not en-

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(*footnote continued from preceding page*)

tiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. • • •"

[2] See note 1, supra.

[3] Section 6201 of the New York Civil Practice Law and Rules states in relevant part:

"An order of attachment may be granted in any action • • • where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. The defendant is a foreign corporation or not a resident or domiciliary of the state; • • •."

titled to an attachment of funds and/or credits in any and all accounts maintained by respondents at said banks in the aforesaid cumulative account.

Several hearings were thereafter had before the District Court and the Court of Appeals for the Second Circuit that are not germane to this petition. During this period, however, petitioner deleted Manufacturers Hanover Trust Company from the temporary restraining order, as it held no funds or other credits of respondents. However, during this period, while the temporary restraining order was in effect, counsel for respondents' advised that the Sumitomo Bank Ltd. had removed $905,739.52 from one of the respondents' account at said bank without authorization.[4]

On March 4, 1976, a hearing was held before the District Court which entered a judgment dated the same day, dismissing petitioner's complaint and vacating the temporary restraining order for lack of jurisdiction on the authority of the decision of this Court in *Bremen*.[5]

Petitioner thereafter filed an appeal with the United States Court of Appeals for the Second Circuit and on April 15, 1976 that Court affirmed the judgment of the District Court on the opinion of Judge Knapp *and* on the authority of *The Bremen* v. *Zapata Off-Shore Co.*, supra.[6] Thereafter petitioner filed a petition with said Court of Appeals for the Second Circuit seeking a re-argument *en*

[4] Said withdrawal is presently the subject of an action in the United States District Court for the Southern District of New York.

[5] Said opinion is found in Appendix A, infra, at pages A1 to A6.

[6] Said decision is found in Appendix B, infra, at pages B1 to B2.

banc of its decision of April 15, 1976. On June 3, 1976 the Court of Appeals for the Second Circuit denied the petition.[7]

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals for the Second Circuit erroneously interpreted the decision of this Court in *The Bremen* v. *Zapata Off-Shore Co.*, supra. If this error remains uncorrected a substantial segment of Admiralty law and practice will be changed—a result not intended by this Court in that decision.

The Courts below ruled that under the authority of *The Bremen* v. *Zapata Off-Shore Co.*, supra, dismissal of petitioner's complaint and temporary restraining order was required because of the following clause contained in all three charter parties:

> "40.(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
>
> (b) Any dispute arising under this charter shall be decided by The English Courts to whose jurisdiction the parties agree whatever their domicile may be:
>
> Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force."

[7] A copy of the Ruling of the Court of Appeals for the Second Circuit denying the petition for re-argument *en banc* is annexed hereto as Appendix C, infra at pages C1 to C2.

In *The Bremen* v. *Zapata Off-Shore Co.*, supra, this Court held that forum selection clauses in contracts are valid and enforceable absent a showing that enforcement thereof would be unreasonable or unjust or that such clause was invalid for reasons such as fraud or overreaching.

This Court in *Bremen* also gave its "policy" reasons for the enforcement of forum selection clauses, stating:

> "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left open to any place were the *Bremen* or Unterweser might happen to be found (footnote omitted). The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." (407 U.S. at pps. 13 and 14)

The Court of Appeals in the instant case interpreted this Court's decision in *Bremen* as standing for the proposition that if a contract contains a forum selection clause the District Court was required to dismiss the United States action for lack of jurisdiction and could not make any alternative arrangements whereby the petitioner could retain the security it may have obtained through Rule B(1) of the Supplemental Admirality Rules.[8]

Petitioner respectfully submits that the Court of Appeals for the Second Circuit has erroneously construed the holding in *The Bremen* v. *Zapata Off-Shore,* supra. It is submitted that *Bremen* stands soley for the proposition that where an agreement contains a forum selection clause such clause should be enforced absent a showing that enforcement thereof would be unreasonable or unjust or that

[8] See note 1, supra.

the clause is invalid for reasons such as fraud or overreaching. *Bremen does not stand* for the proposition that where an agreement contains a forum selection clause, one of the parties to such an agreement is precluded from instituting an action outside the stipulated forum and obtaining security for its claim while being compelled to litigate on the merits only in the stipulated forum.

Clearly, this Court did not decide the issue whether one party to an agreement containing a foreign forum selection clause, assuming it was valid, was precluded from maintaining an action outside the selected forum and obtaining security pending determination of the dispute in the selected forum. The procedural history of *Bremen* unarguably established this fact. The District Court in *The Bremen* v. *Zapata Off-Shore Co.*, supra, simply declined to dismiss the action for *forum non conveniens*—thus the propriety of staying the action while retaining the security posted pending resolution of the dispute in England was not reached and therefore never ruled upon by the Court of Appeals for the Fifth Circuit nor this Court. The case ultimately was remanded to the District Court where Zapata retained the security it had obtained while litigating in England.

The issue herein is whether the party instituting an action has the right to do so outside the selected forum, provided it anticipates having its action stayed if security is obtained, pending a resolution of the dispute in the stipulated forum.

As stated by this Court in *Bremen* a forum selection clause is inserted in agreements such as charter parties so that the parties to the agreement know in advance where disputes will be resolved; but this is not to say, nor did this Court hold, that by inserting such a clause the parties have agreed to waive rights to obtain security elsewhere.

As *Bremen* did not reach the issue of whether a party to an agreement containing a forum selection clause can

institute an action outside the selected forum and obtain security pending determination of the dispute in the selected forum, it is submitted that case law prior and subsequent to the decision in *Bremen* is controlling.

The United States District Courts in the decisions in *Carbon Black Export* v. *The S.S. Monrosa,* 254 F.2d 297 (5th Cir. 1958) Cert. Dism. 359 U.S. 180 and *Indussa Corporation* v. *S.S. Ranborg,* 260 F.Supp. 660 (S.D.N.Y., 1966) reversed 377 F.2d 200 (2nd Cir. 1967), held that the forum selection clauses involved in those cases were enforceable but said courts also held that the security obtained in the actions before said courts would stand. While it is true that in both cases the respective Court of Appeals reversed its District Court, they did so only on the issue of the enforceability of the forum selection clauses and not on the issue of whether the party instituting the action outside the selected forum could retain the security obtained pending determination of the dispute in the foreign forum.

For other pre-*Bremen* decisions dismissing actions brought in United States and relegating litigants to foreign jurisdictions on condition that security be posted, see *Hatzoglou* v. *Asturias Shipping Company, S.A.,* 193 F. Supp. 195 (S.D.N.Y. 1961), *Brillis* v. *Chandris (U.S.A.) Inc.,* 215 F. Supp. 520 (S.D.N.Y. 1963), *Garis* v. *Compania Maritima San Basilio, S.A.,* 261 F. Supp. 917 (S.D.N.Y. 1966), aff'd. 386 F.2d 155 (2 Cir. 1967).

In a recent post-*Bremen* decision, *Kooperativa Forbundet, Stockholm* v. *Vaasa Line Oy, Partenreederei M.S. Ursula Jacob and the S.S. Ursula Jacob, etc.,* 1975 A.M.C. 1972 (S.D.N.Y.) (unreported elsewhere). The District Court (Ward, D.J.) conditionally granted a motion for an order dismissing the action on the ground of *forum non conveniens.* This was not a COGSA case and involved an in rem action by a Swedish shipper against a Finnish ves-

sel for cargo damage. The jurisdiction clause in the bill of lading read as follows:

> "Any claim against the Carrier arising under this Bill of Lading shall be decided at the principal place of business of the Carrier in accordance with the law of the place to which the Carrier and the Merchant hereby submit themselves." (1975 A.M.C. at p. 1973)

The court citing to *The Bremen* v. *Zapata Off-Shore Co.,* supra, held that the above clause was a forum selection clause and was prima facie valid and enforceable. The Court, however, granted defendant-shipowner's motion to dismiss on condition

> "that both defendants submit to the jurisdiction of the courts of Finland without raising any defenses based on laches or time bars, provided such jurisdiction is invoked by plaintiff in a reasonable time and that defendant shipowner deposit a bond in Finland equal to that in this action and incorporating the same terms and conditions." (1975 A.M.C. at p. 1975)

B

The decision of the Court of Appeals for the Second Circuit that it was required under the authority of *Bremen* to dismiss petitioner's complaint has impliedly held invalid Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims under circumstances similar to the case at bar.

It is submitted that the Court below has impliedly held that traditional Writ of Foreign Attachment in admiralty or the use of State Court remedies provided for by Supplemental Rule B(1)[9] cannot be used where the contract

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[9] See note 1, supra.

contains a foreign forum selection clause.[10] In short, security will no longer be allowed in that large body of cases where maritime contracts contain a foreign forum selection clause. If this rule should prevail, parties to maritime contracts might be well advised to forego the luxury of forum selection clauses if possible, although this Court stated in *Bremen* that such clauses are "an indispensable element in international trade, commerce and contracting." It is submitted that this Court in *Bremen* did not intend to curtail the use of Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims.[11]

C.

The decision of the Court of Appeals for the Second Circuit that it was required under the authority of *Bremen* to dismiss Petitioner's complaint has impliedly held invalid Section 8 of Article 9 of the United States Code.

The foreign forum selection clauses in the instant case provide that either party may elect to have disputes referred to arbitration in England rather than to the British Courts.[12] This privilege of election does not affect the application of Supplemental Rule B.

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[10] Indeed, serious doubt is cast upon the continued viability of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims; Said Rule provides in pertinent part:

"ACTIONS IN REM: SPECIAL PROVISIONS

(1) *When Available.* An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto."

[11] See note 1, supra.

[12] Such a clause is also a forum selection clause: See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) wherein this Court stated:

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." (417 U.S. at pg. 519)

Section 8 of the Arbitration Act, Article 9 United States Code[13] provides if an agreement contains an arbitration clause and if one party thereto has a claim which is otherwise cognizable in admiralty, such a party may institute an arbitration proceeding "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings."

Assuming one chooses to institute an arbitration proceeding in accordance with Section 8, the Court can, on its own initiative, stay plaintiff's action and order the parties to arbitration or the plaintiff may move under Section 3, Article 9 United States Code to stay its own action and request the Court to order the parties to arbitration.[14]

Accordingly, it is submitted that the following cases which enforced foreign arbitration clauses while permitting suits to be instituted outside the selected forum for the purpose of obtaining security have been disapproved: *Danielsen* v. *Entre Rios Rys. Co.*, 22 F.2d 326 (D.C. Md. 1927) (arbitration in England); *The Quarrington Court*, 25 F. Supp. 665 (S.D.N.Y. 1938) (arbitration in England); *Uniao De Transportadores* v. *Companhia De Navegacao, etc.*, 84 F. Supp. 582 (E.D.N.Y. 1949) (arbitration in Portugal); *International Refugee Organization* v. *Republic S.S. Corp.*, 93 F. Supp. 798 (D.C. Md. 1950) appeal

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[13] Section 8 of Article 9 United States Code states:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

[14] *Commercial Metals Co.* v. *International Union Marine Corp.*, 294 F. Supp. 570 (S.D.N.Y. 1968); cf. *Kurt Orban Company* v. *S.S. Clymenia*, 318 F. Supp. 1387 (S.D.N.Y., 1970).

dismissed 189 F.2d 858 (4th Cir. 1951) (arbitration in England; *Fox* v. *The Giuseppe Mazzini,* 110 F.Supp. 212 (E.D.N.Y. 1953) (arbitration in England); *Mannesmann Rohrleitungsbau* v. *S.S. Bernhard Howaldt,* 254 F. Supp. 278 (S.D.N.Y. 1965) (arbitration in Holland); *Konstantinidis* v. *S.S. Tarsus,* 248 F. Supp. 280 (S.D.N.Y. 1965) aff'd 354 F.2d 240 (2d Cir. 1965) (arbitration in Turkey).

It is respectfully submitted that this Court in deciding *Bremen* did not intend to hold invalid Section 8 of Article 9 of the United States Code or to overrule the decisions cited above.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of all proceedings, of the case entitled on its docket No. 76-7060, *The Sanko Steamship Co., Ltd., Plaintiff-Appellant, against Newfoundland Refining Company Limited, Newfoundland Refining Company Limited U.S.A., Provincial Building Company Limited, Provincial Refining Company Limited, Provincial Holding Company Limited and Shaheen Natural Resources Company, Inc., Defendants-Appellees;* and that said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

Dated: New York, N. Y.,
July 13, 1976

Respectfully submitted,

THE SANKO STEAMSHIP CO., LTD., Petitioner

By SHELDON A. VOGEL

APPENDIX A

Opinion of the United States District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SANKO STEAMSHIP CO., LTD.,
Plaintiff,

—against—

NEWFOUNDLAND REFINING COMPANY, LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,
Defendants.

MEMORANDUM AND ORDER

76 Civ. 756

KNAPP, *D.J.*

The plaintiff, pursuant to Admiralty Rule B(1) and F.R.C.P. 64, has invoked "the remedies provided by state law for attachment" and seeks to levy upon certain New York bank balances claimed to be owing to some or all of the defendants. The particular provision of state law which plaintiff has invoked is C.P.L.R. § 6201, which so far as relevant, provides:

> "An order of attachment may be granted *in any action,* . . . where the plaintiff has demanded and would be entitled, . . . to a money judgment against one or more defendants, when:
>
> 1. the defendant is a foreign corporation or not a resident or domiciliary of the state;" [emphasis supplied]

Plaintiff duly filed an action in this court alleging breach by defendants of a time charter party agreement. In order to avoid the pitfalls suggested in *Sugar* v. *Curtis Circulation Co.* (S.D.N.Y. 1974) 383 F.Supp. 643, plaintiff did not request the court to issue an attachment *ex parte,* but sought such relief by an appropriate Order to Show Cause.[1]

Thus forewarned, the defendant countered with a motion to dismiss[2] the underlying action, contending that if such motion were granted there would be no "action" to provide the underpinnings of an attachment under the above-quoted statute. For reasons which follow, we believe that defendants' position is well-taken, that the action should be dismissed, and, accordingly, that there is no basis for an attachment.

Discussion

The underlying action against the defendants is for breach of contract. The contract sued upon, however, contains a forum selection clause confining actions for disputes arising thereunder to the Courts of England. Thus the contract provides:

> "40. (a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
>
> (b) Any dispute arising under this charter shall be decided by The English Courts to whose jurisdiction the parties agree whatever their domicile may be:
>
> Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification of re-enactment thereof for the time being in force."

It is defendants' contention that this clause is valid and precludes the plaintiff from invoking the jurisdiction of this court and, therefore, requires that the action be dismissed. We find that defendants' position is conclusively established by *Bremen* v. *Zapata Off-Shore Co.* (1972) 407 U.S. 1. The case laid at rest any doubt as to the enforceability of such clauses and specifically held that they were applicable to *in rem* actions.[3] *Id.* at 20. Plaintiff correctly points out that no question of the validity of an attachment was before the Court in that case.[4] However, we deem that circumstance to be irrelevant. The Supreme Court was obviously not concerned with the provisions of New York C.P.L.R. § 6201. What it did establish was a rule of law which entitles defendants to a dismissal of this action. Such dismissal makes an attachment unavailable under C.P.L.R. § 6201.[5]

Ordinarily this ruling, making any attachment unavailable, would make it unnecessary to determine against which of the several defendants a duly issued attachment would have been effective. However, the Court of Appeals[6] has indicated a desire to have a full record before it, so we shall proceed to make findings on this latter issue.

With respect to the attachability of the funds of the defendants other than the first named defendant (assuming an otherwise valid attachment) we find as follows:

(a) On thepapers before us plaintiff has not born the burden of establishing its entitlement to an attachment of the funds of any but the first named defendant; however,

(b) under the doctrine announced in Judge Moore's opinion in *National Marine Service Inc.* v. *C. J. Thibodeaux & Company* (5th Cir. 1974) 501 F.2d 940 (by which we are persuaded), plaintiff has shown enough to entitle it to conduct further discovery on this issue.

Opinion of the United States District Court.

Accordingly, for reasons more fully stated on the record in open court, should the Court of Appeals reverse my decision as to the applicability of *Bremen* (and issue no further instructions) I shall immediately issue an attachment as to the first named defendant, and hold the matter in *status quo* as to the remaining defendants, referring the issue as to their status to a Magistrate with instructions to supervise discovery and to hear and report.

In the meantime, for the reasons stated in the first part of this opinion, the action is dismissed and the TRO is vacated. The order vacating the TRO is, however stayed until March 11, 1976 at 5:00 P.M. on condition that:

1. All defendants may make disbursements from the accounts in the Sumitomo Bank, Ltd., the European-American Bank & Trust Co., and Manufacturers Hanover Trust Company, based upon the undertaking of all defendants to plaintiff that the only payments which will be made from such bank accounts will be payments of current accounts in the ordinary course of business; conformance with such undertaking of defendants shall not be the responsibility of said banks.
2. In the event the attachment of any of said bank accounts should be reinstated such attachment shall be deemed to have been made upon the amounts in each of said accounts as of the date and hour each of such banks were served with a copy of the temporary restraining order dated February 17, 1976, and plaintiff shall be deemed to have an attachment lien on the company's cash proceeds to the extent thereof.
3. The security posted by plaintiff shall be extended until 5:00 P.M. March 11, 1976.

Opinion of the United States District Court.

4. Anything in the foregoing to the contrary notwithstanding, the banks may honor any checks presented to them on any of the accounts subject to the restraining order, it being the defendants' responsibility to see that their representations are carried out.

So ORDERED.

Dated: New York, New York
March 4, 1976.

/s/ .....
WHITMAN KNAPP, U.S.D.J.

Opinion of the United States District Court.

FOOTNOTES

[1] Contained in said Order to Show Cause, which the Court made returnable 3 days later, was a temporary restraining order, enjoining defendants from removing or releasing $3,000,000 from their respective New York bank accounts. This TRO was later modified on certain conditions which allowed the defendants to conduct their daily business affairs.

[2] This "motion" was made orally on the record, since the press of time did not permit of the formal filing of the appropriate papers.

[3] The Court did leave open, however, the question of whether the clause there involved was "invalid for such reasons as fraud or overreaching" or whether the enforcement of such clause "would be unreasonable or unjust" *Id.*, at 15. In order to meet that burden, the Court observed that the party seeking to escape the forum selection clause must demonstrate that trial in the contractual forum "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court". *Id.*, at 18. At oral argument before us, the instant plaintiff conceded that it could make no such showing.

[4] The parties in *Bremen* specifically eliminated that issue by agreeing upon the posting of security that was to be available in London as well as Florida. See 407 U.S. 1, 4, n. 3, as explained by Petitioner's Reply Brief on certiorari, at p. 10.

[5] We note in passing that nothing turns on the circumstance that plaintiff proceeded by Order to Show Cause rather than by procuring an *ex parte* attachment. Had the latter course been followed, a dismissal of the action would have instantly triggered a *vacatur* of the attachment. So far as we know, there is no provision of New York law which would authorize holding an attachment "in limbo" pending the outcome of litigation going forward in some other jurisdiction.

[6] Since $3,000,000 and a possible question of law of first impression are here involved, plaintiff wished to and did immediately appeal my decision. Before agreeing to hear the case on the merits, the Court of Appeals remanded same to this court for the purposes of establishing a complete record with respect to the relationship between the several defendants and the plaintiff.

APPENDIX B

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of April, one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK
Associate Justice, United States Supreme Court, Retired
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

76-7060

THE SANKO STEAMSHIP CO., LTD.,
Appellant,

v.

NEWFOUNDLAND REFINING COMPANY, LIMITED, et al.,
Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Opinion of the Court of Appeals.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and it hereby is *affirmed* on the opinion of Judge Knapp dated March 4, 1976 (app. 73-80) and on the authority of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1971).

TOM C. CLARK
TOM C. CLARK
Associate Justice

WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

ELLSWORTH A. VAN GRAAFEILAND
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

APPENDIX C

Order Denying Petition for Rehearing *En Banc*.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of June, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges
HON. TOM C. CLARK,
Associate Justice

Docket No. 76-7060

SANKO STEAMSHIP CO. LTD.,

Plaintiff-Appellant

v.

NEWFOUNDLAND REFINING COMPANY, LIMITED, NEWFOUNDLAND REFINING COMPANY, LIMITED, U.S.A., PROVINCIAL BUILDING COMPANY, LIMITED, PROVINCIAL REFINING COMPANY, LIMITED, PROVINCIAL HOLDING COMPANY, LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Defendants-Appellees

Order Denying Petition for Rehearing En Banc.

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, SANKO STEAMSHIP CO. LTD.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
A. DANIEL FUSARO,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-48

THE SANKO STEAMSHIP CO., LTD.,

Petitioner,

—against—

NEWFOUNDLAND REFINING COMPANY LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED, PROVINCIAL HOLDING COMMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF THE WRIT

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TABLE OF STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

THE SANKO STEAMSHIP CO., LTD.,

Petitioner,

—against—

NEWFOUNDLAND REFINING COMPANY LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED, PROVINCIAL HOLDING COMMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF THE WRIT

To the Honorable the Chief Justice and Associate Justices of The Supreme Court of the United States:

Opinions Below

The decisions of the United States District Court for the Southern District of New York and the decisions of the United States Court of Appeals for the Second Circuit

affirming the decision of the District Court and denying rehearing are attached to the Petition.

Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition.

Question Presented

The question presented is not as stated in the Petition, but, based on the full facts as set forth herein, should be "Did the Court of Appeals correctly interpret the decision of this Court in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) in affirming the decision of the District Court dismissing an action commenced by Plaintiff, a Japanese corporation, claiming damages for breach of three charter parties entered into with a Newfoundland corporation, for the charter of three vessels of foreign registry, when the charter parties expressly provided that "Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree. . . ."

Statement of the Case

Petitioner claims to have invoked the provisions of Supplemental Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims. In fact, Petitioner did no such thing. In the affidavit in support of Petitioner's Order to Show Cause, dated February 17, 1976, on which the attachment here involved was based, no mention whatsoever was made concerning the Admiralty Rules. The affidavit specifically states:

> "8. Defendants as aforesaid are foreign corporations, and plaintiff seeks an order of attachment pursuant

> to Rule 64 of the Federal Rules of Civil Procedure, which provides as follows: [Quoting Rule 64]"

The Petitioner, a Japanese corporation, entered into three charter parties with a Newfoundland corporation for the hire of three foreign flag vessels, in which charter the parties agreed that:

> "40(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
>
> "(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree whatever their domicile may be.
>
> "Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the Arbitration Act, 1950. . . ."

The only connection *whatsoever* this case has with the United States is that the Respondents, all affiliated companies, happened to maintain bank accounts in New York City.

ARGUMENT

Petitioner's Point A

Petitioner argues that the decisions below have the effect of changing "a substantial segment of Admiralty law". Having made its original application under Rule 64 of the Federal Rules of Civil Procedure, and *not* under the Supplementary Admiralty Rules, this argument appears to fall of its own weight.

It is respectfully submitted that *no* question of Admiralty law is here involved; that the entire matter is a

simple matter of contract law, and the proper interpretation of Section 6201(1) of the New York Civil Practice Law and Rules.

First. The parties contracted for a specific forum and Petitioner should not be permitted to breach its solemn undertaking. This Court's decision in *Bremen* was decided June 12, 1972, two months prior to the execution of the charter parties here in question. Certainly, the parties and their counsel involved in three multi-million dollar ship charters were well aware of this Court's decision in *Bremen.* Had the parties wished to invoke the protection of the United States Admiralty Rules, they could have so provided in the charter parties; to the contrary, they specifically opted for the laws of England.

Indeed, the forum selection clause in the instant case is far broader than that involved in *Bremen,* which simply stated that:

> "Any dispute arising must be treated before the London Court of Justice". (407 U.S. at 2)

It appears specious to argue that where two foreign corporations agree on English law and English courts to settle their disputes, the enforcement of such a contractual provision by a United States Court somehow changes the United States Admiralty law. The Courts below merely required the parties to carry out what they bargained for.

Second. The decision of this Court in *Bremen* specifically dealt with the question of *in rem* actions and held as follows:

> "For the first time in this litigation, Zapata has suggested to this Court that the forum clause should not be construed to provide for an exclusive forum or to include *in rem* actions. However, the language of the clause is clearly mandatory and all-encompassing; . . ." (407 U.S. at 20)

If an *in rem* action will not lie in the face of a forum selection clause, *a fortiori,* a writ of attachment will not lie.

In the face of this clear and *explicit* holding, Petitioner entered into the instant charter parties with far more explicit and "all encompassing" language than was contained in the *Bremen* charter.

Petitioner argues that:

> "Clearly, this Court did not decide the issue whether one party to an agreement containing a foreign forum selection clause, assuming it was valid, was precluded from maintaining an action outside the selected forum and obtaining security pending determination of the dispute in the selected forum." (Petition, p. 7)

It is respectfully submitted that even if this Court had *not* specifically extended its holding in *Bremen* to include *in rem* actions, which it clearly did, but had excluded *in rem* actions from the scope of the decision (as Petitioner erroneously argues it did), the contractual language here involved would nevertheless dictate that the decisions below were correct.

Not only were the charter parties to be construed in accordance with English law, but "the *relations* between the parties" were to be "*determined* in accordance with the law of England."

Certainly any reasonable construction of this language would include provisional remedies either party might seek against the other, including writs of attachment.

It is respectfully submitted that the decision of this Court *squarely held* that a party may *not* do as Petitioner

suggests and bring any action outside the selected forum, for the purpose of security or otherwise:

> "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or *if jurisdiction were left to any place where the Bremen or Unterweser* [the corporate owner of *Bremen*] *might happen to be found.*[15] The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an *indispensable element* in international trade, commerce and *contracting.*" [Emphasis supplied]

"[15] At the very least, the clause was an effort to eliminate *all uncertainty* as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves. Moreover, while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English Courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. . ." (407 U.S. at 13-14; emphasis supplied)

In support of its argument, Petitioner relies on a number of decisions decided prior to this Court's decision in *Bremen.* It is submitted that the *post Bremen* decisions are uniformly in agreement with the decision of the Court below in requiring dismissal of the complaint.

Bremen has been applied by the First and Ninth Circuit Courts of Appeals so as to require dismissal of the complaint where an action has been brought in a United States District Court in violation of a "forum selection" clause. Thus, in *Fireman's Fund* v. *Puerto Rico Forwarding Co.,* 492 F.2d 1294 (1st Cir. 1974), the Court affirmed a judgment of the United States District Court in Puerto Rico dismissing the complaint for lack of jurisdiction on

the basis of a "forum selection" clause contained in the defendant's bill of lading designating state or federal courts located in New York City as the forum for any actions brought under such bills.

Similarly, in *Republic International Corporation* v. *Amoco Engineers Inc., et al.,* 516 F.2d 161 (9th Cir. 1975), the Court reversed the trial court's denial of a motion to dismiss based upon a "forum selection" clause stating:

> ". . . we hold that this action should have been dismissed because of the forum selection clauses in the construction contracts, which provide that suit must be brought in the courts of Uruguay. This holding follows the reasoning of the Supreme Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 2d 513 (1972); see Roach v. Hapaq-Lloyd, 358 F.Supp. 481 (N.D.Cal. 1973); Jack Winter, Inc. v. Koratron Co., 326 F.Supp. 121 (N.D.Cal. 1971)."

In that case, a default judgment had been entered against the Ministry of Public Works, Republic of Uruguay, one of the defendants, following the District Court's denial of the motion to dismiss.

In *Gaskin* v. *Stumm Handel,* 390 F.Supp. 361 (S.D.N.Y. 1975) the District Court not only dismissed the complaint on the ground of a "forum selection" clause but also vacated an attachment which had been granted by the New York Supreme Court prior to removal of the action to the District Court.

Forum selection clauses also provided the ground for the dismissal of complaints in *Spatz* v. *Nascone,* 364 F. Supp. 967 (W.D.Pa. 1973) and *Roach* v. *Hapaq-Lloyd A.G.,* 358 F.Supp. 481 (N.D.Cal. 1973).

Since dismissal is required in the case of a suit for damages, and since Section 6201(1) of the New York Civil Practice Law and Rules requires a pending "action", the attachment could not stand.

Petitioner's Point B

Petitioner complains that the decision below implicitly held that ". . . the use of State Court remedies provided for by Supplemental Rule B(1) cannot be used where the contract contains a foreign forum selection clause."

If foreign parties to Admiralty contracts wish to avail themselves of the United States Admiralty Rules, certainly it would be simple enough for them to so provide in their agreements. Petitioner did not so do and should not be heard to complain.

Petitioner's Point C

Petitioner argues that the decision below invalidates Section 8 of the Federal Arbitration Act (9 USCA).

Since the action below was not brought under the Federal Arbitration Act no issue with respect thereto is involved.

Petitioner did not want its claim arbitrated and neither did Respondent,* so the entire question of the applicability of the Federal Arbitration Act would appear moot.

Petitioner would have it that under circumstances as here presented, a "game" is played before the Court. Petitioner ignores the arbitration clause and the English forum selection clause and files suit for damages in New York;

* After the decision in the Court of Appeals below, Petitioner commenced two *legal actions* in London under the charter parties.

Respondents, not wishing to arbitrate the matter, but to litigate it in the selected forum, move to dismiss the complaint; somehow, argues Petitioner, the Court is required by the Federal Arbitration Act (which neither party has invoked) to stay the action pending a foreign arbitration which is never going to take place.

It is respectfully submitted that Petitioner is "hoist with his own petard". The mere bringing of the action for damages constitutes a waiver of the right to arbitration (*La National Platanera* v. *North American F. & S.S. Corp.*, 84 F.2d 881 (5th Cir. 1936); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (2nd Cir. 1942)), and a waiver of the provisions of the Federal Arbitration Act.

Here, the (inapplicable) Federal Arbitration Act has a specific provision for a stay pending the arbitration proceedings, if such is sought; Section 6201(1) of the New York Civil Practice Law and Rules under which Petitioner sought its attachment has no provision for a stay pending litigation elsewhere. The failure of New York State to include such a provision in its Civil Practice Law and Rules does not, it is respectfully submitted, create any Federal issue.

CONCLUSION

For the reasons stated above, Respondents say that a Petition for a Writ of Certiorari should be denied.

Dated: August 4, 1976.

Respectfully submitted,

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